

No. 14704 ✓

**United States
Court of Appeals
For the Ninth Circuit.**

EVELYN HUBNER,

Appellant,

vs.

LLOYD M. TUCKER, Special Agent, Internal
Revenue Service,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
Southern Division.**

FILED

JUN 20 1955

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INDEX

[Clerk's Note: When deemed likely to be of an important nature. errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affidavits on Behalf of Petitioner:	
McIver, John L.....	49
Miller, Henry N.....	52
Tucker, Lloyd M.....	46
Affidavits on Behalf of Respondents:	
Boren, Delta M.....	21
Fisher, H. M.....	16
Harrison, Jack M.....	12
Hubner, Beatrice E.....	15
Answer to Petition for Order of Attachment..	11
Certificate of Clerk.....	91
Findings of Fact, Conclusions of Law and Order	70
Memorandum Opinion	58
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	78
Order to Show Cause.....	10
Petition for Order of Attachment.....	3
Petitioner's Brief in Support of Petition for Order of Attachment.....	34

INDEX

PAGE

Request for Additional Findings and for Amendments to Findings of Fact.....	55
Respondent's Brief in Opposition to Petition for Order of Attachment.....	22
Statement of Points on Appeal.....	94
Stay of Commitment Pending Perfection of Appeal	77
Transcript of Proceedings.....	79

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

SLOANE & FISHER.

1230 Bank of America Bldg.,
San Diego 1, Calif.

ROBERT W. CONYERS.

924 San Diego Trust & Savings Bldg.,
San Diego 1, Calif.

For Appellee:

LAUGHLIN E. WATERS,

United States Attorney;

EDWARD R. McHALE,

HARRY D. STEWARD,

HOWARD R. HARRIS,

Assistants U. S. Attorney,

600 Federal Bldg.,

Los Angeles 12, Calif.

United States District Court for the Southern
District of California, Southern Division

Civil No. 1691

LLOYD M. TUCKER, Special Agent, Internal
Revenue Service,

Petitioner,

vs.

EVELYN HUBNER,

Respondent.

PETITION FOR ORDER OF ATTACHMENT
OF PERSON FOR CIVIL CONTEMPT

(Internal Revenue Code, 1954, Section 7604)

Your petitioner, Lloyd M. Tucker, Special Agent,
Internal Revenue Service, respectfully represents as
follows:

I.

This action arises and jurisdiction is granted this
Court under the provisions of the Internal Revenue
Code of 1954, 68A Stat., Sections 7402, 7602, 7603,
7604, 7605; Federal Rules of Civil Procedure 64,
81 (a)(3); and Title 28 United States Code, Sec-
tions 1340 and 1345.

II.

That petitioner is a duly appointed and acting
Special Agent of the Internal Revenue Service and
has been authorized by the Secretary of the Treas-
ury to perform the duties of such office and, spe-
cifically, the duties referred to in Sections 7603 and
7604 of the Internal Revenue Code, 1954.

III.

That at all times herein mentioned the internal revenue tax liability of Clifford O. Boren and Delta M. Boren was, and is, under inquiry and determination by the Internal Revenue Service; that respondent, Evelyn Hubner, has possession, [2*] care, and custody of certain books, records, papers and data hereinafter set forth; that said books, records, papers and data contain therein entries relating to the business of aforesaid Clifford O. Boren and Delta M. Boren; that said books, records, papers and data are material and relevant to said inquiry.

IV.

That said books, records, papers and data are as follows: Books of account of the partnership known as the Hubner Building Company, relating to transactions had by that partnership with the aforesaid Clifford O. Boren and Delta M. Boren for the years 1950, 1951, and 1952, together with pay checks, invoices, correspondence, and any and all miscellaneous records, data and memoranda relating to the transactions between said partnership and the above-named taxpayers.

V.

That on November 4, 1954, respondent, Evelyn Hubner, was summoned under the Internal Revenue laws to appear before petitioner at 527 Land Title Building, 235 Broadway, San Diego, California, on November 29, 1954, at 10:00 o'clock a.m. and there to testify and to produce among other documents said books, records, papers, and data; that for that

*Page numbering appearing at foot of page of original Certified Transcript of Record.

purpose a summons dated November 4, 1954, was issued by petitioner directed to respondent, a true and correct copy of which is attached hereto and incorporated herein as though set forth in full.

VI.

That on November 4, 1954, at San Diego, California, said summons was personally served by delivering in hand to respondent an attested copy thereof; that the certificate of the service of said summons appears on the back of said summons; that a true and correct copy of said certificate is attached hereto and incorporated herein as though set forth in full.

VII.

That respondent, Evelyn Hubner, resides in San Diego County within the Southern District of California.

VIII.

That respondent did wilfully and knowingly neglect and refuse to obey said summons as required, in that respondent did appear at the time and place set forth [3] in the summons but did not produce said books, records, papers and data.

Wherefore, your petitioner prays:

1. That an attachment be issued against said Evelyn Hubner as for a contempt directed to the United States Marshal or his deputy for the arrest of said Evelyn Hubner, and that an order be issued therefor; or that, in lieu thereof, said Evelyn Hubner be ordered to show cause, if any there be, why an attachment should not issue against her as for

a contempt and why she should not be compelled to answer petitioner's questions and produce said books, records, papers and data and, further, why she should not be held in civil contempt.

2. That if satisfactory proof be made, and no sufficient showing to the contrary shall appear, that this Court issue an attachment providing for the arrest of said Evelyn Hubner, compel said Evelyn Hubner to answer petitioner's questions and produce said books, records, papers and data, and for failure thereof to hold said Evelyn Hubner in civil contempt.

3. That such further orders be made consistent with the law for punishment of civil contempt to enforce obedience to the requirements of said summons as may be necessary in the circumstances.

4. For such other and further relief as to the Court may seem just and proper.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

HARRY D. STEWARD and
HOWARD R. HARRIS,
Assistants United States
Attorney;

/s/ HOWARD R. HARRIS,
Attorneys for Petitioner.

Duly verified. [4]

U. S. Treasury Department—Internal
Revenue Service

SUMMONS

In the matter of the tax liability of:

CLIFFORD O. BOREN and
DELTA M. BOREN.

Internal Revenue District of Los Angeles

Period(s):

Years 1950, 1951, and 1952.

The Commissioner of Internal Revenue

To: Evelyn Hubner.

At: San Diego, California.

Greeting:

You are hereby summoned and required to appear before Lloyd M. Tucker, an officer of the Internal Revenue Service, to give testimony relating to the tax liability and/or the collection of the tax liability of the above-named person for the period(s) designated and/or to bring with you and produce for examination the following books, records, and papers at the time and place hereinafter set forth: Books of account of the partnership known as the Hubner Building Company and the corporation known as the Hubner Building Company relating to transactions had by that partnership and corporation with the above-named Clifford O. Boren and Delta M. Boren for the years above stated, together

with paid checks, invoices, correspondence, and any and all miscellaneous records, data, and memoranda relating to transactions between the Hubner Building Company and the above-named taxpayers.

Place and time for appearance: at 527 Land Title Building, 235 Broadway, San Diego, California, on the 29th day of November, 1954, at 10:00 o'clock a.m.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States Commissioner to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of Section 7602, Internal Revenue Code of 1954 this 5th day of November, 1954.

/s/ LLOYD M. TUCKER,

Special Agent, Internal
Revenue Service. [6]

CERTIFICATE OF SERVICE OF SUMMONS

(Pursuant to Section 7603, Internal Revenue
Code of 1954)

I hereby certify that I served the summons on the reverse hereof.

Date Summons Served: On November 5, 1954.

Time: 11:40 a.m. At: 2676 Ridgeview Dr., San Diego, California.

☒ I handed an attested copy thereof to the person to whom it was directed.

At: 2676 Ridgeview Dr., San Diego, California.

How Summons Was Served (Check One)

☐ I left attested copy thereof with the following person at the last and usual place of abode of the person to whom it is directed.

Name

Address

/s/ LLOYD M. TUCKER,
Special Agent.

Sec. 7603. Service of Summons.—A summons issued under Section 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

[Endorsed]: Filed December 14, 1954. [7]

fully in her sole possession, and no other person has or claims to have any interest in such books, records, etc.

III.

Answering Paragraph VIII of the Petition respondent alleges that she did not produce said books, records, papers and data at the time and place set forth in the summons, and further alleges that at said time and place she, among other things, relied upon and asserted her rights under the Fifth Amendment to the Constitution of the United States to refuse to incriminate herself.

/s/ ROBERT W. CONYERS,
Attorney for Respondent.

Duly verified.

[Endorsed]: Filed January 5, 1955. [11]

[Title of District Court and Cause.]

AFFIDAVIT OF JACK M. HARRISON RE PETITION FOR ORDER OF ATTACHMENT

State of California,
County of San Diego—ss.

Jack M. Harrison, being first duly sworn, deposes and says:

Affiant is an attorney-at-law, licensed to practice in the State of California and is admitted to practice before the Treasury Department. Affiant is a licensed certified public accountant in the State of California.

During the years 1950, 1951, 1952 and 1953 affiant was one of the attorneys of the Hubner Building Co. and of one E. J. Hubner, and kept books and records of Hubner Building Co., made entries thereon, and prepared the income tax returns for E. J. Hubner and for the Hubner Building Co.; that at all times during such years the books and records of Hubner Building Co. were kept in affiant's office and under his control.

Prior to November 10, 1952, one Henry N. Miller, known [12] to affiant as a revenue agent of the United States Treasury, examined the books and records of the Hubner Building Co. for the period February 14, 1950, through September 30, 1950, during which period said Hubner Building Co. was a corporation. As a result of that investigation, an adjustment in the tax liability of said corporation was made by way of an over-assessment of \$17,-766.99.

Between December 16, 1953, and March 2, 1954, one John L. McIver, known to affiant to be a revenue agent of the United States Treasury, conducted an investigation of the books, records, checks, invoices, credits, and other data and memoranda of the Hubner Building Co. for the taxable years ending February 28, 1951, and February 29, 1952, and of the members of Hubner Building Co. for the taxable years ended December 31, 1951, and December 31, 1952. Such investigation was conducted on the premises and in the office of affiant and all such records of which affiant had control

were made available to said John L. McIver for examination and investigation.

During the period of investigation by said John L. McIver, said McIver, on occasion, had with him the aforesaid Henry Miller, who likewise conducted an examination of the aforesaid books and, in particular, such of the aforesaid books and records as related to the transactions had between Hubner Building Co. and Clifford O. Boren and Delta M. Boren and the Clifford O. Boren Contracting Co., Inc. Said Miller requested of affiant and received permission for the removal from said office of certain records, including checks, invoices and correspondence specifically relating to said transactions. Affiant understood that these records were removed by said Miller for the purpose of photostating the same. Thereafter said records were returned to affiant and replaced in the files of said Hubner Building Co.

/s/ JACK M. HARRISON.

Subscribed and sworn to before me this 5th day of January, 1955.

[Seal]

/s/ JOHN A. BRANT,

Notary Public in and for Said
County and State.

[Endorsed]: Filed January 5, 1955. [13]

[Title of District Court and Cause.]

AFFIDAVIT OF BEATRICE EVELYN HUBNER
RE PETITION FOR ORDER OF ATTACHMENT

State of California,
County of San Diego—ss.

Beatrice Evelyn Hubner, being first duly sworn, deposes and says:

Affiant is the respondent made a party to the above-entitled action under the name of Evelyn Hubner. Affiant's maiden name was Beatrice Evelyn Newsome; affiant intermarried with E. J. Hubner on May 23, 1952.

Prior to the aforementioned marriage, on or about August 1, 1951, E. J. Hubner transferred and deeded to affiant, in her maiden name, certain real property in the County of San Diego, commonly known as the Big Oak Ranch.

Affiant, as wife of E. J. Hubner, filed a joint tax return with said E. J. Hubner for the taxable year ending December 31, 1952. Included in said tax return was income earned by E. J. Hubner as a partner in the Hubner Building Co. during the partnership's fiscal year, March 1, 1951, through and including February 28, 1952.

Affiant now has in her possession certain books and records which would fall within the definition set forth on the summons which is the subject of this [14] action. Said books and records relate to

income received by E. J. Hubner during the years 1951 and 1952, as reported on the joint tax return of respondent and E. J. Hubner for the taxable year ending December 31, 1952, as above set forth.

Affiant is informed and believes, and therefore states, that no other person has or claims any right or interest in the title or possession of said books and records.

/s/ BEATRICE EVELYN HUBNER.

Subscribed and sworn to before me this 5th day of January, 1955.

[Seal] /s/ H. M. FISHER,
Notary Public in and for the County of San Diego,
State of California.

[Endorsed]: Filed January 5, 1955. [15]

[Title of District Court and Cause.]

AFFIDAVIT OF H. M. FISHER RE PETITION
FOR ORDER OF ATTACHMENT

State of California,
County of San Diego—ss.

H. M. Fisher, being first duly sworn, deposes and says:

He is one of the attorneys for Respondent Beatrice Evelyn Hubner (who is a party to this action under the name of Evelyn Hubner) and has been

acting as such since January, 1954. In the course of such employment he has represented Beatrice Evelyn Hubner in both her individual capacity and as executrix of the Estate of Elmer John Hubner, deceased. On or about April 26, 1954, affiant was contacted by John L. McIver, who was and is a Revenue Agent with the Bureau of Internal Revenue; that Mr. McIver represented that he had made an investigation of the Hubner Building Co. books and records and was in the process of ascertaining the necessity of making further assessments against the decedent, E. J. Hubner, and that for such purpose he was desirous of examining certain personal records of said E. J. Hubner and he therefore requested affiant to supply such records for examination. The years under investigation covered the period of the active operation of the Hubner Building Co., to wit 1950, 1951, [16] 1952 and 1953.

Affiant had a number of conversations with said McIver regarding the tax liability of E. J. Hubner and affiant supplied to McIver such records as he was able to discover and obtain. Upon the occasion of the first such conversation affiant asked said McIver whether McIver's investigation was an ordinary audit of the tax liability of E. J. Hubner or was in the nature of a fraud investigation, whereupon said McIver stated to affiant that at the time he considered it an ordinary audit and he hoped there would be no fraud matters involved. At the last conference held between affiant and McIver

affiant was shown McIver's work sheets and calculations. McIver informed affiant, on the basis of said calculations and work sheets, that said McIver calculated income tax deficiency of E. J. Hubner for the year ending December 31, 1951, in the amount of \$13,666.64, and that he calculated over-payment of E. J. Hubner and Beatrice Evelyn Hubner for the tax year ending December 31, 1952, in the sum of \$1,687.06. At such conference McIver requested affiant to procure acceptance by Beatrice Evelyn Hubner of such redetermination on Treasury Department Form No. 870. Thereupon affiant questioned said McIver on whether or not a fraud investigation was then under way or contemplated on the same years as to the same taxpayers and said McIver stated that he was not making a fraud investigation, but that there was a definite likelihood that a fraud investigation would be initiated. McIver further stated that any deficiency assessed against E. J. Hubner could be collected from certain real and personal property held by Beatrice Evelyn Hubner as her separate property, in that said E. J. Hubner during his lifetime had made a gift of certain real property, commonly known as Big Oak Ranch, San Diego County, to Beatrice Evelyn Hubner and that the aforesaid separate property could be traced back through the gift of Big Oak Ranch and that, therefore, such separate property would be subject to a transferee's liability under the Internal Revenue Code for deficiencies and fraud penalties.

On receiving such explanation from said McIver, affiant informed said McIver that he would not advise said Beatrice Evelyn Hubner to consent to the redetermination of tax for the years 1951 and 1952, as presented by said McIver, for the reason which affiant stated to said McIver that said Beatrice Evelyn [17] Hubner might find it necessary to protect her separate property against a transferee's liability on the deficiency then presented by said McIver, and that after the expenditure of time and money in the defense of her property, she might then find it necessary to again protect her separate property from a transferee's liability upon a possible fraud deficiency against said E. J. Hubner. Thereafter said Beatrice Evelyn Hubner received from the Director of Internal Revenue, U. S. Treasury Department Form No. 1200, commonly referred to as a thirty-day letter, which letter bore the date of September 7, 1954, and covered the aforesaid deficiency assessment of \$13,666.64 for the taxable year ending December 31, 1951, and that she also received from the Director of Internal Revenue U. S. Treasury Department Form No. 1200, commonly referred to as a thirty-day letter, which letter bore the date of September 7, 1954, and covered the aforesaid over-assessment of \$1,687.06 for the taxable year ending December 31, 1952.

On or about October 22, 1954, affiant attended a conference at which petitioner herein and Forrest Cawkins were present. Forrest Cawkins is known to affiant as an agent of the Treasury Department

and aiding and assisting petitioner in the investigation in which the summons which is the subject of this action was issued. At said conference affiant stated that he had reason to believe that the purpose of the investigation, pursuant to which the summons which is the subject of this action was issued, was, in fact, directed and concerned with the tax returns of E. J. Hubner for the period under investigation. He stated to petitioner and Cawkins that he did not feel that the records which were being sought should be delivered to them on the mere representation that they were being used to examine the tax liabilities of Clifford O. Boren and Delta M. Boren and not that of E. J. Hubner. Either petitioner or said Cawkins stated to affiant that affiant should take the statement on the summons then under consideration to the effect that it was directed to the tax liability of the Borens, to be an assurance from the Treasury Department that the affairs of Hubner were not under investigation. Whereupon affiant stated his opinion to be that neither petitioner nor Cawkins could give such assurance and that the statement on the summons above referred to did not constitute such an assurance [18] and, further, that affiant, as attorney for respondent, would permit the examination of the books of the Hubner Building Co. only if a full-written assurance by a person authorized to give such assurance in the Treasury Department were delivered to affiant or respondent. No such written

assurance has been delivered to affiant or respondent.

/s/ H. M. FISHER.

Subscribed and sworn to before me this 5th day of January, 1955.

[Seal] /s/ ROBERT C. THAXTON,
Notary Public in and for the County of San Diego,
State of California.

[Endorsed]: Filed January 5, 1955. [19]

[Title of District Court and Cause.]

AFFIDAVIT OF DELTA M. BOREN RE
PETITION FOR ORDER OF ATTACHMENT

State of California,
County of San Diego—ss.

Delta M. Boren, being first duly sworn, deposes and says:

On September 8, 1954, your affiant was contacted by a Mr. Charles D. Ford, who identified himself as a Revenue Agent, and arranged for a meeting with your affiant. Your affiant met with Mr. Ford on September 14, 1954.

On September 14, 1954, Mr. Ford informed your affiant that he had been conducting tax fraud examinations and that he was a fraud agent. He said that he had been sent down to San Diego to investigate the building industry.

Mr. Ford informed your affiant that Mr. Henry Miller had been sent in to make investigations for Mr. Ford, since he did not know whether he had been recognized as being a fraud agent.

On September 15, 1954, at another meeting with Mr. Ford, he stated to your affiant that he had been doing a tax fraud [20] investigation of E. J. Hubner.

/s/ DELTA M. BOREN,

Subscribed and sworn to before me this 3rd day of January, 1955.

[Seal] /s/ JOHN A. BRANT,

Notary Public in and for Said
County and State.

[Endorsed]: Filed January 5, 1955. [21]

[Title of District Court and Cause.]

BRIEF IN OPPOSITION TO PETITION FOR ORDER OF ATTACHMENT

Introduction

Respondent opposes the petition herein on the grounds (1) that the summons and petition herein are fatally defective, (2) that the respondent may not be required to produce the records prayed for because under the facts of the case such a required disclosure would be a violation of the Fourth and

Fifth Amendments to the United States Constitution.

Facts

The Hubner Building Co. was a corporation from February 14, 1950, to September 30, 1950. Thereafter the Hubner Building Co. was dissolved as a corporation and continued business as a partnership until the time of its dissolution on June 6, 1951, and its wind-up and final distribution on February 28, 1953. At all times the President of Hubner Building Co. was E. J. Hubner, who was a stockholder of the corporation and general partner of the partnership.

Respondent Beatrice Evelyn Hubner is the surviving spouse of E. J. Hubner, who died on January 12, 1954. Respondent married said E. J. Hubner on May 23, 1952, prior to which time her name was Beatrice Evelyn Newsome. [22]

On August 1, 1951, prior to the marriage of respondent and E. J. Hubner, he transferred to respondent, in her maiden name of Beatrice Evelyn Newsome, as her sole and separate property certain real property in San Diego County commonly known as Big Oak Ranch.

E. J. Hubner filed his own separate federal tax returns for the tax years ending December 31, 1950, and December 31, 1951. E. J. Hubner and respondent filed joint federal tax returns, as husband and wife, for the tax years ending December 31, 1952, and December 31, 1953.

The Bureau of Internal Revenue conducted an investigation of the Hubner Building Co., a corporation, after its dissolution, and as a result adjusted its return. This examination was conducted by the same Henry Miller hereinafter referred to.

Thereafter the Bureau of Internal Revenue conducted an extensive examination of the records of the Hubner Building Co. partnership and the records of E. J. Hubner, with particular reference to the taxable years of the Hubner Building Co. ending February 28, 1951, and February 29, 1952, and to the taxable year of E. J. Hubner ending December 31, 1951, and to the taxable year of E. J. Hubner and respondent ending December 31, 1952. Such examination was mainly conducted by Revenue Agent John L. McIver. As a result of such examination the Bureau of Internal Revenue assessed a deficiency against E. J. Hubner, personally, in the sum of \$13,666.64 for the taxable year 1951 and determined an over-assessment against E. J. Hubner and Respondent in the amount of \$1,687.06 for the taxable year 1952.

During the conduct of such investigation another revenue agent by the name of Henry Miller was conducting an examination of the same books and records for the same years, with particular reference to the transactions between the Hubner Building Co. and E. J. Hubner personally, on one hand, and Clifford O. Boren Contracting Co., Inc., Clifford O. Boren individually, and Delta M. Boren individually, on the other hand. Said Henry Miller

examined the aforesaid records at the same time and in the presence of John L. McIver. Henry Miller asked for and received permission to extract numerous documents, including checks, invoices and other papers, from the records of the Hubner [23] Building Co. for the purpose of photostating them. These documents were later returned by Henry Miller to the custodian of the Hubner Building Co. files.

After the examination had been completed by John L. McIver and Henry Miller, John L. McIver discussed the above deficiency and over-assessment with one of Respondent's attorneys and informed him that there was a likelihood of a fraud investigation against E. J. Hubner during the conduct of Hubner Building Co. and that such fraud investigation would necessarily relate to the personal tax liability of E. J. Hubner in the years 1950 and 1951 and all the personal tax liabilities of E. J. Hubner and Respondent, who filed joint tax returns for the years 1952 and 1953. John L. McIver during such discussion also stated that if such deficiencies as were assessed against E. J. Hubner in years prior to Respondent's personal liabilities by virtue of her signing a joint return, were not satisfied out of E. J. Hubner's personal estate, then such deficiencies could be assessed against Respondent's separate property traceable to the transfer from E. J. Hubner of Big Oak Ranch.

In making his examination the aforementioned Henry Miller was apparently working under the direction of one Charles D. Ford, an agent of the

Bureau of Internal Revenue then in charge of making fraud investigations into the tax returns of persons affiliated with the contracting business in San Diego County.

Respondent now lawfully has in her possession certain books, records, papers, paychecks, invoices, credits and other miscellaneous records, data and memoranda falling within the definition set forth in the summons which is the subject of this action. No person other than respondent has or claims any interest in the property or possession of such books, records, etc.

In compliance with the aforementioned summons, Respondent appeared at the time and place designated therein, with Robert W. Conyers, one of her attorneys, but Respondent did not produce any of the books, records or papers set forth therein on the grounds that said summons was defective and that she was entitled to withhold such books and records from the Bureau of Internal Revenue under protection of the Fifth Amendment to the Constitution of the United States. [24]

Respondent hereby makes reference to the Affidavits of Jack Harrison, H. M. Fisher, Delta M. Boren and Beatrice Evelyn Hubner, on file in this action, and by this reference incorporates the same herein as though set forth in full.

Law

The Treasury Department is entitled to but one examination of the taxpayer's books as a matter of

course. A second examination of the taxpayer's books for any one year may not be made except where the Secretary of the Treasury, or his delegate, require it (a) after investigation, and (b) when it is a necessity, and (c) after written notice to the taxpayer.

Sec. 7605(b) Internal Revenue Code.

Chandis Securities Co. v. Martin,
128 Fed. 2d 731 (CCA-9), affirming 33 Fed.
Supp. 478.

Internal Revenue Code Section 7605(b) is a limitation upon the power of the Treasury Department and not merely a right assertable only by the person against whom a tax liability is being investigated.

Chandis Securities Co. v. Martin, *supra*.

A third party whose tax liability is not under investigation may assert his right and the limitation on the Treasury Department under Section 7605(b) when his own books are sought to be examined a second time.

Chandis Securities Co. v. Martin, *supra*.

No examination is permitted of a taxpayer's books after three years has elapsed from the filing of a return, except on a factual showing indicating fraud, concealment or wrong-doing.

Chandis Securities Co. v. Martin, *supra*.

Zimmerman v. Wilson,
81 Fed. 2d 847 (CCA-3).

After examination and adjustment of tax liabilities of a taxpayer as to any one year no examination of a taxpayer's books is permitted, except on a factual showing indicating fraud, concealment or wrong-doing.

Zimmerman v. Wilson,
105 Fed. 2d 583 (CCA-3).

Agents may not "under official pretext, but in fact officiously, extend their powers beyond those provided by the law * * *." [25]

Newfield v. Ryan,
91 Fed. 2d 700 (CCA-5).

Cert. denied, 302 U. S. 729.

First National Bank v. U. S.,
160 Fed. 2d 532.

"The agents are not the sole judges as to the scope of the examination. They must satisfy the court that what they seek may be actually needed. Otherwise, they would be assuming inquisitorial powers beyond the scope of the statute."

Martin v. Chandis Securities Co.,
33 Fed. Supp. 478.

The right under the Internal Revenue Code to make a second examination must relate to particular matters and may not be the means of a "fishing expedition."

First National Bank v. U. S.,
160 Fed. 2d 532.

Chandis Securities Co. v. Martin,
128 Fed. 2d 731.

In the case of a summons or subpoena to produce papers, some evidence must be produced to show the materiality of the papers demanded.

Fed. Trade Comm. v. American Tobacco Co.,
264 U. S. 298; 44 S. Ct. 336; 68 L. Ed. 696.

Hale v. Hinkle,
201 U. S. 43; 26 S. Ct. 370; 50 L. Ed. 652.

To permit under color of a summons the examination of books and records covering years for which returns were filed more than three years prior to the issuance of the summons, without complying with the requirements of the Internal Revenue Code, would constitute an unlawful search and seizure.

Zimmerman v. Wilson,
81 Fed. 2d 847.

A subpoena duces tecum or summons requiring the production of documents must be limited to a reasonable period of time and specify with reasonable particularity the subjects to which the desired writings relate.

Hale v. Hinkle, *supra*.

Brown v. U. S.,
267 U. S. 134; 48 S. Ct. 288; 72 L. Ed. 500.

U. S. v. Medical Society,
26 Fed. Supp. 55 at 57; 18 Hughes Federal
Practice and Procedure, 280, Sec. [26]
23892.

Nothing short of the most explicit language should induce the court to attribute to Congress the intent to authorize a fishing expedition into private papers in view of the provisions of the Constitution against unreasonable searches and seizures.

Federal Trade Commission v. American Tobacco Co., 264 U. S. 298.

A penalty or forfeiture which is not in its nature purely remedial is in the broad sense a "criminal case" falling within the protection of the Fifth Amendment.

Boyd v. U. S.,
116 U. S. 616; 29 L. Ed. 746.

Lees v. U. S.,
150 U. S. 476; 37 L. Ed. 1150.

In considering the right of an individual to protection against compulsory self-incrimination under the Fifth Amendment to the United States Constitution, the definition of "criminal case" is much broader than when it is used in its technical sense in relation to procedural matters which may likewise be constitutionally guaranteed under other provisions.

U. S. v. Regan,
232 U. S. 37 at 50; 58 L. Ed. 494 at 499.

Hepner v. U. S.,

213 U. S. 103 at 111-12; 53 L. Ed. 720 at 723-24.

Cf. *Helvering v. Mitchell*,

303 U. S. 391, 58; S. Ct. 630, 82 L. Ed. 917.

(A case involving the procedural question of double jeopardy).

Argument

Petitioner by an administrative summons is attempting to force the production of books and records identified as belonging to the Hubner Building Co. but now in the sole and lawful possession of the Respondent.

Respondent urges that the proper jurisdictional basis for issuing of any summons to her is lacking. The affidavits on file and a part of the record in this action establish that the books and records sought by the summons have already been thoroughly examined and, in part, photostated by agents of the Bureau of Internal Revenue. As a result of these examinations, adjustments were made in the income and deductions of the corporation, the partnership, and [27] the individual members of the partnership. Nowhere in the record is it alleged, nor is it a fact, that any written notice has been given to Respondent or anyone else after the first examinations, nor has any showing of necessity been made in such a notice or to the Court, nor has any showing of subsequent investigation been made, all as required by

Section 7605(b) of the Internal Revenue Code to any second examination of a taxpayer's books.

It has been established in the Chandis case, cited hereinabove, that this Statute is a limitation on the powers of the Treasury which can be relied upon by any person whose books may be sought after one examination and regardless of whose tax liability may be the subject of inquiry.

Respondent does not have the possession of the books and records referred to in the Petition as a mere custodian. Such books and records reflect her personal tax liabilities for the year 1952 and 1953 and as such were required by law to be kept by her. No person has, or claims to have, any interest in the property or possession of the books identified in the Petition except the Respondent.

As to the year 1950 and the fiscal year ended February 28, 1951, referred to in the Petition, the summons and petition are fatally defective not only because no compliance with Section 7605(b) is shown, but because no examination is permitted by the statute of limitations applicable to those years without an allegation of fraud or misrepresentation (cf. Chandis case, *supra*). No such allegation is made.

Respondent, in refusing to produce the records called for, has also relied upon her privilege against self-incrimination set out in the Fifth Amendment to the Constitution of the United States. In spite of the fact that petitioner has alleged that only the

tax liability of Clifford O. Boren and Delta M. Boren was and is under inquiry, the Affidavits, which are a part of the record herein, outline several instances wherein attorneys for Respondent and others were advised by agents of the Bureau that, in fact, the tax liabilities of E. J. Hubner and of the Respondent were being inquired into, that the agents named therein were attempting to establish fraud on the part of the Hubners and that, in fact, one agent, Henry Miller, was conducting his investigations under the direction of Charles D. Ford, a Bureau agent then in charge of fraud investigations. [28]

Respondent's right under the Fifth Amendment to avoid the production of evidence incriminating to her will be of little service or dignity if they are to be denied because petitioner now represents to the Court that he is concerned, at the moment, with the tax liability of no one except the Borens.

Respectfully submitted,

SLOANE & FISHER,

ROBERT W. CONYERS,

By /s/ ROBERT W. CONYERS,

Attorneys for Respondent.

[Endorsed]: Filed January 5, 1955. [29]

[Title of District Court and Cause.]

BRIEF IN SUPPORT OF PETITION FOR ORDER OF ATTACHMENT OF PERSON FOR CIVIL CONTEMPT

An analysis of respondent's brief and supporting affidavits indicates that the respondent is relying upon three separate grounds in opposition to the summons which was served upon her in accordance with the provisions of the Internal Revenue laws. These three grounds succinctly stated are as follows:

1. That the summons is fatally defective on its face in that it specifies the year 1950 as one of the taxable years under investigation, and concludes that the three-year statute of limitations has run as to that particular year;

2. That the books and records as set forth in the summons have been examined by agents of the Internal Revenue Service and that additional examination is not authorized, under the law, and

3. That response by the respondent to the summons would tend to incriminate her within the meaning of the Fifth Amendment to the United States Constitution.

These three grounds will be discussed [30] hereinafter.

I.

Summons Valid on Its Face

The summons on file herein clearly discloses that the Internal Revenue Service is investigating the

income tax liability of Clifford O. Boren and his wife, Delta M. Boren, for the taxable years 1950, 1951, and 1952. Nowhere in said summons does it state that the investigation is directed towards the ascertainment of tax liability of respondent, the estate of Hubner, Hubner Building Company, or any other concern connected with respondent. The affidavits filed in support of respondent's resistance are insufficient as a matter of law to show that Internal Revenue Service is now or contemplates in the future an investigation of the respondent as aforesaid. The most that may be said of these affidavits is that the respondent thinks there may be some sort of an investigation of her tax returns for the year 1953. Your petitioner, on the other hand, has set forth by affidavits of appropriate Internal Revenue Officers showing that the investigation is not directed towards respondent, the estate of Hubner, the Hubner Building Company or other concern of respondent. To the contrary, it is clearly stated that the officers are directing their investigation strictly and solely toward the ascertainment of possible violations of the Internal Revenue Laws by Clifford O. Boren and Delta M. Boren. The true scope of the examination becomes material in view of the U. S. Treasury Department Form 872, marked Exhibit A, attached hereto and hereby made a part hereof. This form constitutes a consent by the Borens to the extension of the Statute of Limitations as to their civil tax liability for the year 1950 to and including June 30, 1955. Therefore, the summons is valid on its face.

In addition to the Form 872 Agreement, however, petitioner has signed an affidavit stating that the preliminary investigation of the Borens' tax return for the years 1950 and 1951 indicates that in excess of \$40,000.00 of taxable income was not included in their returns. The petitioner further stated that no justifiable or legal reason for such nondisclosure has been found to date. The only conclusion that can therefore be reached is the nondisclosure was and is fraudulent. In addition to the affidavits of the petitioner as aforesaid, the affidavit of Henry Miller has been filed which shows that in the opinion of Miller [31] and under the provisions of the Internal Revenue policies and procedures an indication of fraud was disclosed during the course of his examination of the transactions between the Borens and the Hubner Building Company. These two affidavits when considered in view of the other documents on file herein clearly show that there is reasonable grounds to believe that the Borens have engaged in fraudulent practices with respect to certain provisions of the Internal Revenue laws. So for still another reason, the summons is good on its face as to all documents, etc., requested and as to each of the years set forth.

II.

Books and Papers Once Examined

The statements set forth under "I" above pertaining to the taxpayer actually under investigation also bear on respondent's argument that her books and papers have been once examined by the In-

ternal Revenue Service. The affidavits on file herein in support of petitioner show that the examination of the Hubner Building Company, a partnership; Hubner individually, and as the estate of Hubner, and respondent was concluded, and there is not now nor contemplated any further investigation either of a civil or criminal nature. The books and records set forth in the summons are needed only for the purpose of the investigation of the Borens and as such respondent cannot complain. It is clearly shown that the books and records now in respondent's possession must be examined to ascertain the tax consequences of a customer of the Hubner Building Company and not the Hubner Building Company itself.

It would appear inconceivable that an investigation of a taxpayer such as made of the Hubner Building Company would forever bar Internal Revenue Service from thereafter again checking the books and records of the Hubner Building Company on matters pertaining to, and solely affecting, the tax liability of one of Hubner's customers. For example, the situation becomes clear if one assumes for the moment that a large bank is investigated by Internal Revenue Service for a certain taxable year and after such investigation arrives at a settlement of the tax liability for that particular year. Under respondent's theory the Internal Revenue Service would thereafter be precluded from again examining the bank's books and records, not only

as they may pertain to the bank's liability but also as they [32] may pertain to the tax investigation and the liability of all of the bank's depositors, customers, and the like. Such an interpretation would obviously be very strained and if carried to the dryly illogical extremes possible could effectively tie the hands of the Internal Revenue Service.

It is true that during the course of a preliminary audit and examination of the Borens by Henry Miller that certain of the books and records of the Hubner Building Company were scrutinized by Miller. It is likewise true as set forth in Miller's affidavit that he examined only certain of the Hubner books and did not conduct a full-scale examination as would be required under normal Internal Revenue Service practices and procedures. To the contrary, Mr. Miller examined the books and records only far enough to show to him that there was an indication of fraud. He, thereupon, concluded his investigation and referred the matter to his superiors.

It is respectfully submitted that the restrictions on examination of taxpayers' books of account were never intended to preclude a complete investigation of fraud. Under the Internal Revenue Service policy and procedures an agent is required to discontinue his examination when fraud is shown or indicated and when further investigation is necessary another division is assigned cognizance of the matter. Reason and common sense would seem to indicate that when the statute says that the books

of account shall be inspected only once for a taxable year, Congress meant that this be a full and final examination and not an examination only far enough to indicate fraud. The use of the words "unnecessary" examination or investigation would likewise tend to indicate that Congress had in mind not the thwarting of the Internal Revenue Service of their valid official functions but rather to prevent the harassment of taxpayers. The record on file herein clearly shows that neither the Borens or the respondent have been subjected to any unnecessary examination or investigation and in truth and in fact only a partial examination and investigation of the Borens has so far been conducted. The Borens have now declined permission to examine their individual records. The facts are much different here than in the Chandice Securities Company case relied upon so heavily by respondent. Also bearing on the question of the necessity of a complete examination are the affidavits of the petitioner and Mr. Miller setting forth the facts pertaining to fraudulent conduct on the part of the Borens. [33]

III.

Self-Incrimination

Again it is respectfully submitted that respondent is not being investigated by Internal Revenue Service and no investigation is contemplated in the future. In any event, however, respondent cannot avail herself of the privilege guaranteed under the Fifth Amendment of the Constitution on the state

of the record presented by her. Nowhere is it shown that respondent by any stretch of the imagination could be subjected to criminal prosecution. The most that can be said on the basis of papers filed in support of her opposition to your petitioner is that she might be liable as a transferee for inadequate consideration. This, of course, if true, would subject her to civil liability and not criminal prosecution.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney;

HARRY D. STEWARD and
HOWARD R. HARRIS,
Assistants United States
Attorney;

By /s/ HARRY D. STEWARD,
Attorneys for Petitioner. [34]

Points and Authorities

Government agents making examination under statute permitting internal revenue agents to examine books, papers, records or memoranda bearing upon matters required to be included in income tax return, are performing a public function, and are presumed to do their duty, and it cannot be assumed that they will abuse their authority in carrying out the examination.

Under statute permitting internal revenue agents to examine books, papers, records or memoranda

bearing upon matters required to be included in income tax return, internal revenue agent, and not the keeper of the records, is authorized to determine what items appearing in the records are related to the tax returns under investigation.

(U. S. v. First Nat. Bank of Mobile,
67 F. Supp. 616, modified 160 F. 2d 532.)

Statute which fixes certain general time limitations upon the assessment, or suit for collection, of income taxes, has no applicability upon need for an investigation for the detection of false or fraudulent returns, nor does it have any relation to the period which may be covered by such investigation.

(U. S. v. Peoples Deposit Bank & Trust Co.,
112 F. Supp. 720.)

In view of scope and purposes of statute authorizing Commissioner of Internal Revenue, for purposes of ascertaining correctness of income tax return, to authorize employees of Bureau of Internal Revenue to examine books, papers, records, or memoranda bearing on matters required to be included in income tax return, and to require attendance of any person having knowledge in the premises, courts should not circumscribe unduly the officials of the government in performing duties in investigation of tax fraud.

(Stone v. Frandle, 89 F. Supp. 222.) [35]

Statute permitting Internal Revenue agent to examine books, papers, records and memorandum, bearing upon matters required to be included in income tax return, can be applied to books of persons other than taxpayer whose return is under investigation.

Words in statute permitting Internal Revenue agent to examine books and records bearing upon matters required in income tax return must be interpreted liberally to fulfill the purpose for which statute was enacted.

(U. S. ex rel. Sathre v. Third Northwestern Nat. Bank, 102 F. Supp. 879.)

A third party will be required to produce records bearing on income tax return under statute, where internal revenue agent specifies records with sufficient precision for their identification, and agent's demands are within scope of statute, and agent alleges that documents bear on matters required to be included in return, and agent's demands are not too general and are not merely exploratory fishing expeditions.

(First Nat. Bank of Mobile, et al., v. U. S., 160 F. 2d 532.)

We have heretofore noted that the power granted to the Commissioner by 26 U.S.C.A., Sec. 3614, is inquisitorial in character and is similar to the power vested in federal grand juries. As said by the Eighth Circuit in *Brownson v. United States*,

supra, 32 F. 2d at page 848, “* * * the statutes involved * * * should receive a like liberal construction in view of the like important ends sought by the government.”

(*Falsone v. United States*, 205 F. 2d 742.)

Words in statute permitting Internal Revenue agent to examine books and records bearing upon matters required in income tax return must be interpreted liberally to fulfill the purpose for which statute was enacted.

(*U. S. ex rel. Sathre v. Third Northwestern Nat. Bank*, 102 F. Supp. 880.) [36]

Government agents making examination under statute permitting internal revenue agents to examine books, papers, records or memoranda bearing upon matters required to be included in income tax return, are performing a public function, and are presumed to do their duty, and it cannot be assumed that they will abuse their authority in carrying out the examination.

(*U. S. v. First Nat. Bank of Mobile, et al.*, 67 Fed. Supp. 616-617.)

Zimmermann v. Wilson, 81 F. 2d 847, cited by respondent, was considered and rejected by the Honorable L. Hand.

McMann v. Securities and Exchange Commission, 87 F. 2d 377.

The Court's attention is respectfully directed to this entire case and the excellent reasoning set forth therein.

If during an investigation of an income, excess profits, estate or gift tax return (including a return under the Vinson Act, as amended) an internal revenue agent discovers what he believes to be indications of fraud, he will immediately suspend his investigation and report his findings in writing to the Chief of the Audit Division * * *

(Internal Revenue Manual,
Section 4567.) [37]

EXHIBIT A

Form 872

U. S. Treasury Department
Internal Revenue Service

(Revised Feb. 1953)

Original

CONSENT FIXING PERIOD OF LIMITATION UPON ASSESSMENT OF INCOME AND PROFITS TAX

Copy

(Received Jan. 5, 1954. Director of Internal Revenue, Audit Division, Los Angeles, California.)

....., 19.....

In pursuance of the provisions of existing Internal Revenue Laws Clifford O. and Delta M. Boren, a taxpayer (or taxpayers) of San Diego, California, and the Commissioner of Internal Revenue hereby consent and agree as follows:

That the amount of any income, excess-profits, or war-profits taxes due under any return (or returns) made by or on behalf of the above-named taxpayer (or taxpayers) for the taxable year ended December 31, 1950, under existing acts, or under prior revenue acts, may be assessed at any time on or before June 30, 1955, except that, if a notice of a deficiency in tax is sent to said taxpayer (or taxpayers) by registered mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the Commissioner is prohibited from making an assessment and for sixty days thereafter.

/s/ CLIFFORD O. BOREN,
Taxpayer.¹

/s/ DELTA M. BOREN,
Taxpayer.¹

¹This consent may be executed by the taxpayer's attorney or agent, provided such action is specifically authorized by a power of attorney, which, if not previously filed, must accompany the consent.

If executed with respect to a year for which a Joint Return of a Husband and Wife was filed, this consent must be signed by both spouses unless one spouse, acting under a power of attorney, signs as agent for the other.

If a consent form is executed by a person acting in a fiduciary capacity, such as executor, administrator, or trustee, such person must submit Form 56, "Notice to the Commissioner of Internal Revenue of Fiduciary Relationship," together with certified copy of letters of administration, letters testamentary, trust instruments, or court certificate.

[Seal²] By

/s/ T. COLEMAN ANDREWS,
Commissioner of Internal
Revenue.

By GDM.

1-6-1954.

[Endorsed]: Filed January 12, 1955. [38]

[Title of District Court and Cause.]

AFFIDAVIT OF LLOYD M. TUCKER

United States of America,
Southern District of California—ss.

Lloyd M. Tucker, being first duly sworn, deposes and says:

That I am now and have been for the last nine years a Special Agent of the Internal Revenue Service and for the four years last past have been assigned to the San Diego Office of the Internal Revenue Service. That my duties primarily con-

²If this consent is executed on behalf of a corporation, it shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which the seal of the corporation must be affixed. Where the corporation has no seal, the consent must be accompanied by a certified copy of the resolution passed by the board of directors, giving the officer authority to sign the consent.

cern the investigation of alleged evasions of income taxes and matters related thereto in the enforcement of the Internal Revenue laws;

That I was assigned to the investigation of the tax returns of Clifford O. Boren and his wife, Delta M. Boren, for the years 1950 and 1951. That during the course of this investigation summonses were issued to various parties calling upon them to produce certain records and evidence pertaining to the tax liability of the Borens. One of such summonses was issued to respondent Evelyn Hubner for the books and records in her possession which pertained to the transactions between the Hubner Building Company and the Borens. [39]

That my investigation was directed solely towards the Borens and it was in no wise directed toward the tax liability, if any, of the estate of Hubner or the respondent. That I am informed and believe and upon such information and belief state that the only tax matters of the Hubner Building Company, of Hubner Estate, or respondent, now being considered in any respect by Internal Revenue Service is the matter set forth in the affidavit of John L. McIver, as filed herein. In addition, I am in a position to know whether an investigation of a non-civil nature of the estate of Hubner or the respondent is being conducted or contemplated by Internal Revenue Service and I know of no such investigation or contemplated investigation.

Preliminary investigation of the taxable years 1950 and 1951 of the Borens shows that in excess of

\$40,000.00 of taxable income was not reported by the taxpayers as required by law. No evidence has been discovered to date tending to show that this nondisclosure was due to mistake, inadvertence, or other justifiable or legal reason, or tending to show that it was not done with the purpose and intent to evade and defeat the payment of the taxpayers' income taxes.

The transactions between the Hubner Building Company and the Borens are material and relevant as to the extent of the nondisclosure and as to whether in fact such nondisclosure was fraudulent.

/s/ LLOYD M. TUCKER.

Subscribed and Sworn to before me, this 11th day of January, 1955.

[Seal] EDMUND L. SMITH,
Clerk, U. S. District Court, Southern District of
California,

By /s/ HELEN M. WHITE,
Deputy.

[Endorsed]: Filed January 12, 1955. [40]

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN L. McIVER

United States of America,
Southern District of California—ss.

John L. McIver, being first duly sworn, deposes and says:

That I am an Internal Revenue Agent having been so employed for a period of thirty-three years; that I am presently assigned to the Internal Revenue Service at San Diego, California; that my duties in connection with such position are the examination of income tax returns and their verification; that my duties are solely confined to matters concerning the civil tax liability of taxpayers as distinguished from investigation of possible criminal liability.

That pursuant to the existing procedures I was assigned to investigate the civil tax liability of the Hubner Building Company, a partnership, composed of E. J. Hubner, Alton Bookman Jackson, and Wrelton Clarke. I initially audited the books and records of the Hubner Building Company and as a result of such audit determined that there were a number of changes in the reported income [41] which would result in an increase in the net income to the partnership. As a result of this investigation I secured a Form 875 Agreement from the partnership through Alton Bookman Jackson, one of the partners. This form in effect concurs with the findings of the examining officer, and for all practical

purposes finally disposes of the civil aspects of the tax consequences. I, thereafter, traced the additional income which was occasioned but not reported by partners on their individual returns. This resulted in a net deficiency on the return of Jackson, Clarke and Hubner. With respect to Hubner it was necessary to the proper evaluation of the additional income reflected by the partnership that I examine all available records pertaining to his individual income. The result of the audit of Hubner showed that Hubner was individually liable for additional income tax. A Form 870 Agreement was prepared and presented to Mr. Fisher, attorney for the estate of E. J. Hubner, setting forth the results of my investigation of Hubner individually. Mr. Fisher then advised me that the estate of Hubner had insufficient assets to pay the deficiency; whereupon, I inquired as to what had become of the Big Oak Ranch which showed as an asset of Hubner. I was then advised that the ranch had been deeded to respondent in consideration for a loan of \$20,000.00. I then advised Mr. Fisher that the records reflected that Hubner had expended close to \$100,000.00 for the ranch and improvements and that it appeared that it was a transfer on wholly inadequate consideration, and as such respondent might be liable individually under the existing regulations. Several days later Mr. Fisher advised me that he had recommended to his client that she not execute the Form 870 Agreement. In accordance with the existing regulations and instructions of the Internal Revenue Service, I rendered a complete

report of the entire transaction to my superior and was thereafter no longer concerned with the case.

The offering of the Form 870 Agreement is an indication by the Internal Revenue Service that such deficiency if accepted will close the case against the taxpayer. Under the normal procedure, if Mrs. Hubner had signed the Form 870 Agreement the matter with respect to her liability and the [42] liability of the estate of Hubner would be closed by the Internal Revenue Service.

As stated above, my function with Internal Revenue Service is confined solely to ascertainment of civil tax liability under the regulations in effect at all times material herein. If any indications of fraud are found, the investigation is immediately discontinued by me and a report made in writing to the chief of the Audit Division. As far as I am concerned, as an Internal Revenue Agent, the matter is then closed.

During a full investigation of all available records of the Hubner Building Company and Hubner individually, I discovered no evidence of fraud and consequently did not refer the matter to my superior as I would have been required to do under the regulations aforesaid. Based upon my thirty-three years of experience as an Internal Revenue Agent, it is my opinion that another investigation of the books and records which I examined of the Hubner Building Company and Hubner individu-

purposes finally disposes of the civil aspects of the tax consequences. I, thereafter, traced the additional income which was occasioned but not reported by partners on their individual returns. This resulted in a net deficiency on the return of Jackson, Clarke and Hubner. With respect to Hubner it was necessary to the proper evaluation of the additional income reflected by the partnership that I examine all available records pertaining to his individual income. The result of the audit of Hubner showed that Hubner was individually liable for additional income tax. A Form 870 Agreement was prepared and presented to Mr. Fisher, attorney for the estate of E. J. Hubner, setting forth the results of my investigation of Hubner individually. Mr. Fisher then advised me that the estate of Hubner had insufficient assets to pay the deficiency; whereupon, I inquired as to what had become of the Big Oak Ranch which showed as an asset of Hubner. I was then advised that the ranch had been deeded to respondent in consideration for a loan of \$20,000.00. I then advised Mr. Fisher that the records reflected that Hubner had expended close to \$100,000.00 for the ranch and improvements and that it appeared that it was a transfer on wholly inadequate consideration, and as such respondent might be liable individually under the existing regulations. Several days later Mr. Fisher advised me that he had recommended to his client that she not execute the Form 870 Agreement. In accordance with the existing regulations and instructions of the Internal Revenue Service, I rendered a complete

report of the entire transaction to my superior and was thereafter no longer concerned with the case.

The offering of the Form 870 Agreement is an indication by the Internal Revenue Service that such deficiency if accepted will close the case against the taxpayer. Under the normal procedure, if Mrs. Hubner had signed the Form 870 Agreement the matter with respect to her liability and the [42] liability of the estate of Hubner would be closed by the Internal Revenue Service.

As stated above, my function with Internal Revenue Service is confined solely to ascertainment of civil tax liability under the regulations in effect at all times material herein. If any indications of fraud are found, the investigation is immediately discontinued by me and a report made in writing to the chief of the Audit Division. As far as I am concerned, as an Internal Revenue Agent, the matter is then closed.

During a full investigation of all available records of the Hubner Building Company and Hubner individually, I discovered no evidence of fraud and consequently did not refer the matter to my superior as I would have been required to do under the regulations aforesaid. Based upon my thirty-three years of experience as an Internal Revenue Agent, it is my opinion that another investigation of the books and records which I examined of the Hubner Building Company and Hubner individu-

ally would not disclose fraud by Hubner or the partnership.

I have examined the brief and supporting affidavits filed by respondent purporting to state that I advised respondent's attorneys that there was a likelihood of a fraud investigation of Hubner. I do not recall ever having made such a statement and wish to state that it would be contrary to the instructions of the Internal Revenue Service and I would, therefore, not have made such a statement.

/s/ JOHN L. McIVER.

Subscribed and Sworn to before me, this 12th day of January, 1955.

[Seal] EDMUND L. SMITH,
Clerk, U. S. District Court, Southern District of California;

By /s/ HELEN M. WHITE,
Deputy.

[Endorsed]: Filed January 12, 1955. [43]

[Title of District Court and Cause.]

AFFIDAVIT OF HENRY N. MILLER

United States of America,
Southern District of California—ss.

Henry N. Miller, being first duly sworn, deposes and says:

I have been an Internal Revenue Agent for the past thirteen years and I am presently assigned to

the San Diego Office of the Internal Revenue Service; that my duties are primarily the examination of income tax returns of various taxpayers, pertaining to the civil aspects of the Internal Revenue laws.

In accordance with normal Internal Revenue Service procedures, I was assigned to examine the books and records of the Hubner Building Company, a corporation. An examination of its books and records disclosed that the corporation was in existence for a few months only. After a full audit, it was determined that in fact the corporation had overpaid its income tax for the taxable period during 1950, and a report was submitted recommending payment of the over-assessment. This concluded my portion of the examination of the Hubner Building Company, a corporation, and to the best of my knowledge concluded all investigation by Internal Revenue Service with respect to this particular corporation.

At a later time I was assigned to examine the books and records of Clifford O. Boren and Delta M. Boren. While conducting the investigation of the Borens, [44] I learned that Mr. McIver, Internal Revenue Agent, was likewise conducting a similar investigation of the Hubner Building Company, a partnership. It was noted that certain transactions were had between Borens and the Hubner Building Company, and in an effort to determine the accuracy of my audit I checked certain of the Hubner Building Company books and records

pertaining to the Borens. The records that I checked were the cash disbursement journal, cancelled checks, and supporting invoices reflecting payments from Hubner Building Company to the Borens. I thereafter compared these records with the records of the Borens and noted certain discrepancies. These discrepancies, when considered in light of other facts which were available, led me to believe that there were indications of fraud. Pursuant to the policies and procedures of Internal Revenue Service, I thereupon immediately reported my findings in writing to the Chief of the Audit Division and suspended all further investigations.

I did not examine any books and records other than related above nor did I take the statements of or discuss with any representative of the Hubner Building Company the matters disclosed by my examination.

My examination of the Hubner books and documents as related above is not in any sense a complete examination, and in order to secure an accurate and complete picture of the transactions between Hubner Building Company and the Borens it is my opinion that other documents, papers, etc., would have to be examined and statements taken from those concerned. Such additional examination and investigation is, of course, not within the per-view of my duties.

/s/ HENRY N. MILLER.

Subscribed and Sworn to before me, this 12th day of January, 1955.

[Seal] EDMUND L. SMITH,
Clerk, U. S. District Court, Southern District of
California;

By /s/ HELEN M. WHITE,
Deputy.

[Endorsed]: Filed January 12, 1955. [45]

[Title of District Court and Cause.]

REQUEST FOR ADDITIONAL FINDINGS
AND FOR AMENDMENTS TO FINDINGS
OF FACT

Respondent requests the following additions and amendments to the Findings of Fact proposed by petitioner.

I.

At Paragraph III thereof, by striking out the words "as Executrix of the Estate of Elmer J. Hubner" on Line 16 and by striking out the words "any and all" at Line 18 of the findings proposed by petitioner, and

By adding to Paragraph III thereof, at Line 17, the words "certain of" so that Line 17 of Paragraph III would then read "has custody of certain of the books of account," etc.

II.

By adding to Paragraph IV of the findings submitted by petitioner, the following: "That said refusal was based upon the grounds (a) that a response to the Summons would tend to [55] incriminate respondent within the meaning of the Fifth Amendment to the Constitution, and (b) that petitioner had not complied with the requirements under Section 7605(b) of the Internal Revenue Code for a second examination of respondent's books, and (c) that the requested examination violated respondent's rights under the Fourth Amendment to the United States Constitution."

III.

At Paragraph VI thereof, by striking out the words "that said partnership consisted of Elmer J. Hubner, Alton B. Jackson and Wrelton Clarke" at Lines 6 and 7, and

By adding to Paragraph VI thereof the words "that Elmer J. Hubner was at all times a general partner in and President of said partnership."

IV.

By adding to Paragraph VII thereof the following: "That the books and records of the Hubner Building Company, a partnership, reflect the personal tax liabilities of respondent for the years 1952 and 1953; that affiant filed a joint tax return with Elmer J. Hubner for the taxable year ending December 31, 1952. Included in said tax return was

income earned by Elmer J. Hubner as a partner in the Hubner Building Company during the partnership's fiscal year, March 1, 1951, through and including February 28, 1952."

V.

By striking out from Paragraph IX thereof, on **Page 4 at Line 4**, the following words: "That sufficient evidence of fraud by the taxpayers, Clifford O. Boren and Delta M. Boren, has been shown," and

By adding to Paragraph IX, Page 4, in the place of the words requested stricken the following words, "that during the course of a prior examination of the transactions between the Borens and the Hubner Building Company an indication of fraud was [56] disclosed to."

VI.

By striking out from Paragraph X thereof the words, "that investigation of the Borens has only been commenced and is not a full examination within the meaning of the provisions of the Internal Revenue Act."

VII.

By adding another paragraph to the proposed findings to be known as Paragraph XI to read as follows: That the books and records as set forth in the Summons have been examined once by agents of the Internal Revenue Service for the years 1950, 1951, 1952 and 1953 and that neither petitioner nor anyone else complied with the provisions of Section

7605(b) of the Internal Revenue Code prior to serving the Summons in the instant case on respondent.

Respectfully submitted,

SLOANE & FISHER,

ROBERT W. CONYERS,

By /s/ ROBERT W. CONYERS,
Attorneys for Respondent.

Receipt of copy acknowledged.

[Endorsed]: February 14, 1955. [57]

[Title of District Court and Cause.]

MEMORANDUM

This is a proceeding which is filed under the provisions of Section 7604 of the 1954 Internal Revenue Code,¹ seeking the enforcement by this court

¹“§ 7604. Enforcement of summons.

“(a) Jurisdiction of district court—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district Court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

“(b) Enforcement—Whenever any person summoned under Section 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States

of a subpoena issued by the Internal Revenue Bureau under Section 7602² of that Code.

According to the face of the summons, the investigation concerns the tax liability of Clifford O. Boren and Delta M. Boren. The summons is directed to the respondent, Evelyn Hubner, requiring her to appear on November 29, 1954, before Lloyd M. Tucker, an internal revenue officer, and to bring the books and records of the partnership known as the Hubner Building Company, and the corporation known as the Hubner Building Company, relating to transactions had by that partnership with the said Clifford O. Boren and Delta M. Boren

Commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or the commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States Commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience." (Formerly Sections 3633(a) and 3615(e) of Title 26, U.S.C.A.) [58]

²"§ 7602. Examination of books and witnesses.

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or

for the years 1950, 1951 and 1952, together with pay checks, invoices, correspondence, and any and all miscellaneous records, data and memoranda relating to the transactions between said partnership and the above-named taxpayers.

The respondent appeared at the time and place set in summons, but declined to produce any of the books and records claiming that to do so would violate her right against self-incrimination under the Fifth Amendment. This proceeding [59] followed.

The Fifth Amendment provides:

“No person * * * shall be compelled in any criminal case to be a witness against himself * * *”

collecting any such liability, the Secretary or his delegate is authorized:

“(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

“(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

“(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.” (Formerly Sections 3614, 3615(a), (b), (c), and 3632(a)(1) of Title 26, U.S.C.A.)

Its prohibitions have been extended by judicial interpretation to reach beyond a criminal "case," so as to include almost every kind of a proceeding or act done under authority or color of authority wherein a person in answer to a question might give a fact which might lead to other evidence which might tend to connect that person with the commission of a crime. They are the so-called "rungs of a ladder" or "link in a chain" cases. *Blau v. United States*, 340 U. S. 159; *Hoffman v. United States*, 341 U. S. 479; *Greenberg v. United States*, 343 U. S. 918; *Singleton v. United States*, 343 U. S. 944; *United States v. Weisman* (2 Cir., 1940), 111 F. 2d. 260; *Kasinowitz v. United States* (9 Cir., 1950), 181 F. 2d. 632; *United States v. Coffey* (3 Cir., 1952), 198 F. 2d. 438.

The Third Circuit, in deciding the Coffey case (*supra*) commented on the Hoffman, Greenberg and Singleton cases (*supra*) and the Mason case (244 U. S. 362) and said:

"[2] Accordingly, we now have to reinterpret the Supreme Court's Hoffman opinion in the light of that court's subsequent revelation that Hoffman proceeds on a theory broad enough to require the same result in the circumstances of Greenberg and Singleton. Specifically, we think the problem is what to do about apparently innocuous questions, the answers to which are admittedly not incriminating in themselves when there are not additional facts before the Court which suggest particular connecting links through which the answer might lead to and might result in incrimination of

the witness. We think the Supreme Court is saying that such facts are not necessary to the sustaining of the privilege. The decision in the Mason case would not be followed today. It is enough (1) that the trial court be shown by argument how conceivably a prosecutor, building on the seemingly harmless answer, might proceed step by step to link the witness with some crime against the United States, and (2) that this suggested course and [60] scheme of linkage not seem incredible in the circumstances of the particular case."

Carried to the logical extreme, the doctrine of those cases would permit a witness to stand mute in response to any question, such as a query as to one's name or address, since a response could conceivably be a connecting link.

But I do not read the Constitution or the doctrine of the above cases as intending to completely paralyze the Government in its investigative functions. Certainly not under the facts in this case.

From the petition for attachment, the answer and the affidavits filed on both sides, it is apparent that the investigation being conducted by the Internal Revenue Bureau is not an investigation of the respondent, Evelyn Hubner, for any possible criminal liability, tax, or otherwise. It is an investigation directed to the affairs and possible tax liability and possible criminal liability of Clifford O. Boren and Delto M. Boren, both of whom are persons different than the respondent, Evelyn Hubner, and neither of whom appears to have been an officer, director,

employee or partner of either Hubner Company, corporation or partnership.

It appears that the Hubner Building Company was engaged in the building business. It was a corporation from February 14, 1950, to September 30, 1950, at which time the Hubner Building Company was dissolved as a corporation and continued business as a partnership until the time of its dissolution on January 6, 1951. Its affairs, however, according to the affidavit, were not finally wound up until February 28, 1953.

The respondent, Beatrice Evelyn Hubner, is the surviving spouse of E. J. Hubner who died January 12, 1954, and who appears to have been the moving factor of the [61] corporation, Hubner Construction Company, and one of the partners while it was a partnership. Respondent did not marry E. J. Hubner until May 23, 1952, after the dissolution of the partnership and after the dissolution of the corporation.

The books which are sought here are the books and records of the partnership and/or the corporation. It is quite apparent from the pleadings and affidavits filed here that the respondent, Evelyn Hubner, is not and was not, either a stockholder, director, or officer of the corporation, or a partner of the partnership, or an employee of either.

Some claim is made that by virtue of a transfer of certain property known as the Big Oak Ranch by E. J. Hubner to the respondent in this case,

which occurred in 1951 prior to the marriage, the respondent is fearful that the Government may make some additional tax claim arising out of the affairs of the Hubner Building Company or Hubner personally and, in connection therewith, attempt to pursue the property which was thus transferred to the respondent.

That is not a sufficient ground for the refusal to answer any questions or to present any records, even though the disclosures made might result in a civil proceeding against the respondent for the recovery of that property so transferred to her to satisfy any tax liability which might be assessed against E. J. Hubner or the Hubner Building Company.

A civil proceeding attempting to enforce civil liability under the internal revenue statutes is not protected by the Constitutional guaranties of the Fifth Amendment—*Helvering v. Mitchell* (1938), 303 U. S. 391.

Although not raised at the time of response to summons or in the answer filed to the petition, respondent [62] in her brief relies upon the provisions of Section 7605(b) of the 1954 Internal Revenue Code (formerly 26 U.S.C.A. 3631), which reads as follows:

“§ 7605. Time and place of examination.

“* * *

“(b) Restrictions on examination of taxpayer—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection

of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary."

It is conceded by the government that the Internal Revenue Bureau conducted a previous examination of the books of both the corporation and partnership which resulted in additional assessments and refunds to the Hubner Company. Those books were examined with a view of determining only the liability of the Hubner Companies or E. J. Hubner, and were not examined with a view of determining the liability of the Borens or either of them.

The respondent in the brief relies largely upon the case of *Martin v. Chandis Securities Co.* (9 Cir., 1942), 128 F. 2d. 731.

In that case, while it did involve the enforcement of a subpoena and the examination of books and records in the hands of the Chandis Securities Company concerning the possible tax liability of a third person named Chandler, the court there stated that Section 3631 [now 7605(b)] of the Internal Revenue Code, limited the examinations of a taxpayer's (the Borens' here) books to those which were necessary, and likewise was a limitation on the power of the Bureau to examine a third person's (respondent here) books only when such examination was shown to be "necessary." [63]

However, upon an analysis of that case, it becomes quite evident that all that the Ninth Circuit held was that where the statute of limitations on the face of the record had expired against the taxpayer under investigation, an examination of the third person's books was not necessary. The examination was prohibited solely on that ground and not because there had been a prior examination.

There is no such element present in this case. The statute of limitations against the persons under investigation, the Borens, has not run, and if it has run, the Borens themselves have consented to an extension of time, having signed a consent extending the period of limitation upon assessment of income tax and profits tax. Therefore, the Chandis Securities case is not authority for the position taken by the respondent in this case.

Furthermore, the Chandis case would have another ground of distinction, as in that case they sought in the year of 1940 to compel the production of records from 1916 to 1930. No such a situation is present here. The records which are sought to be examined are the records for the years 1950, 1951 and 1952, which are not comparable to the attempt in the Chandis case to procure records that were many years old.

Moreover, as I view the provision of the Internal Revenue Code which prohibits the examination of books which are unnecessary, it becomes a question of fact to be decided in each case as to whether such examination is or is not necessary.

The facts in this case show that the Hubner Companies had considerable dealings with the Borens, and that there is a possible additional tax liability of the Borens in excess of \$40,000.00 for the years 1950-1951; that the previous examination of the Hubner books indicated that a full audit [64] of them in connection with the Boren investigation would produce facts bearing upon the possible liability or non-liability of the Borens. The presently requested examination is thus "necessary." I have examined the other authorities cited and relied on by respondent, and find that they are not in point.

The respondent makes the point that the procedural requirements of 7605(b) were not complied with. The procedural requirement that a second or additional examination of a taxpayer's books can be made only at the taxpayer's request or on written notification of the Secretary, applies only to a second examination of the books of a taxpayer whose tax is in question. They do not apply to a case, such as here, where the books are those of a third person (Hubner) and not the books of the one whose tax is in question (the Borens). In such case the sole question which can be raised is necessary for the examination under the Chandis case, *supra*. Obviously the "taxpayer" referred to in Section 7605(b) is the one whose return is under investigation. It does not mean a third party who, as here, in the final analysis is merely a witness having in her possession evidence concerning the possible tax liability of some other person or persons.

Respondent also contends that the provisions of the Fourth Amendment to the Constitution against unreasonable searches and seizures justifies her refusal to comply with the summons.

It is only unreasonable searches and seizures which are prohibited. In *U. S. v. First National Bank* (Ala., 1924), 295 Fed. 142, affirmed 267 U. S. 576, the bank refused to produce its books and records in response to a summons issued under the same provisions of the statute here involved, as they then existed. The inquiry was not concerning the bank's tax [65] liability, but that of two individuals doing business with the bank. The court held the Fourth Amendment not applicable. The records sought here are not the personal records of the respondent. She merely has possession of them. Congress has by statute (26 U.S.C.A. 7602) authorized wide investigation and inquiry and it would completely frustrate the purposes of the statute if mere custodians of records could refuse to produce them in relation to investigation of the possible tax liability of another person.

The element of unreasonableness present in the *Chandis* case, *supra*, where numerous and burdensome records as much as 24 years old were sought is not present here; nor is there present the unreasonableness such as existed in *First National Bank of Mobile v. U. S.* (CCA 5, 1947), 160 F. 2d. 532, where the appellate court held the summons unreasonable only insofar as it required the bank

to examine over six million entries covering a five-year period in order to comply.

The demands of the summons are not unreasonable under the facts of the case before the court.

Another ground is suggested—that the books here are not material to the investigation. I do not think that the respondent here is in any position to raise that question. Whether they are material or are not material is a question which can be raised by the party involved, namely, the Borens, if it can be raised at all, and I do not think it can be raised in this kind of a proceeding by the person who is not being investigated as the taxpayer.

The prayer of the petition ought to be, and is, granted.

Rather than commit the defendant to jail for contempt until she produces the books, perhaps a method can be worked [66] out which would not be burdensome, either upon the respondent or upon the Government, and still, at the same time, would preserve to the respondent the records which she naturally wants to have preserved for whatever purpose she may desire or need them for herself or as administratrix of the estate of the deceased.

The United States Attorney will prepare findings of fact, conclusions of law, and order for my signature, granting the petition, committing the respondent to jail for contempt until she produces the books, which will be stayed until February 18, 1955, at 12:00 o'clock noon, and it will thereafter be

permanently stayed if the respondent, prior thereto, deposits all of the books and records with the Clerk of this court, where they may remain for examination by both respondent, at her convenience, and the Internal Revenue Agents, at their convenience.

Dated: San Diego, California, this 17th day of February, 1955.

/s/ PEIRSON M. HALL,

United States District Judge.

[Endorsed]: Filed February 17, 1955. [67]

United States District Court for the Southern
District of California, Southern Division

Civil No. 1691

LLOYD M. TUCKER, Special Agent, Internal
Revenue Service,

Petitioner,

vs.

EVELYN HUBNER,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-entitled cause came on regularly for hearing on February 3, 1955, Laughlin E. Waters, United States Attorney, and Harry D. Steward, Assistant United States Attorney, for petitioner;

respondent appearing personally and through her attorneys, Hugo M. Fisher and Robert W. Conyers, and the Court having duly considered the evidence and being fully advised in the premises now finds the following:

Findings of Fact

I.

That petitioner is a duly appointed and acting Special Agent of the Internal Revenue Service and has been authorized by the Secretary of the Treasury to perform the duties of such office and, specifically, the duties referred to in Sections 7603 and 7604 of the Internal Revenue Code, 1954. [68]

II.

That summons was duly issued and served by Lloyd M. Tucker on the respondent, Evelyn Hubner, on November 5, 1954, requiring that she appear before him to give testimony relating to the tax liability of Clifford O. Boren and Delta M. Boren for the years 1950, 1951 and 1952 and to bring with her and produce for examination the following books, records and papers at 527 Land Title Building, 235 Broadway, San Diego, California, on the 29th day of November, 1954, at 10:00 o'clock a.m.: Books of Account of the partnership known as the Hubner Building Company and the corporation known as the Hubner Building Company, relating to transactions had by that partnership and corporation with the above-named Clifford O. Boren and Delta M. Boren for the years above stated, together with pay checks, invoices, correspondence

and any and all miscellaneous records, data, and memoranda relating to transactions between the Hubner Building Company and the above-named taxpayers.

III.

That respondent is executrix of the estate of Elmer J. Hubner, deceased. That she had and now has custody of Books of Account, and records described in said summons, and set forth in paragraph II hereof.

IV.

That respondent did wilfully and knowingly neglect and refuse to obey said summons in that respondent did appear at the time and place set forth in the summons but did not produce said books, records, papers and data.

V.

That respondent resides in San Diego County, California, within the Southern District of California, and that this Court has jurisdiction of this matter under the provisions of the Internal Revenue Code of 1954 and Title 28 of the United States Code, Sections 1340 and 1345.

VI.

That the Hubner Building Company was a corporation from February 14, 1950, to September 30, 1950; that said corporation was dissolved and business was continued as a partnership under the name of Hubner Building Company until the [69] date of its dissolution on June 6, 1951, and its windup and final distribution on February 28, 1953. That

said partnership consisted of Elmer J. Hubner, Alton B. Jackson and Wrelton Clarke.

VII.

That said Elmer J. Hubner intermarried with respondent on May 23, 1952, which marriage was dissolved by the death of E. J. Hubner on January 12, 1954. That the only connection respondent had with or interest in said Hubner Building Company and Corporation was as the wife of E. J. Hubner, deceased, and in no other capacity, and had no other connection with said Company or Corporation. Respondent did file a joint tax return with E. J. Hubner for the year ending December 31, 1952.

VIII.

That the books and records of the Hubner Building Company, a corporation, and the Hubner Building Company, a partnership, were investigated by agents of the Internal Revenue Service which investigation resulted in a final determination of the tax consequences of the corporation and an offer of final settlement of tax liability of the estate of E. J. Hubner, arising out of the operation of the Hubner Building Company, a partnership. That such tax liability is of a civil nature and would be concluded by acceptance of this offer. That no investigation of a criminal nature of the corporation or the partnership or of the estate of E. J. Hubner or the respondent is in progress or is contemplated by the Internal Revenue Service.

IX.

That the taxpayers under investigation by the

Internal Revenue Service are Clifford O. Boren and Delta M. Boren and not respondent, the Hubner Building Company, a corporation; the Hubner Building Company, a partnership; the estate of E. J. Hubner or any other association or individual connected with respondent.

That it has not been shown that respondent could be subjected to any criminal proceedings in connection with any of the books, records and miscellaneous documents which formed the subject matter of the summons, and it is only shown [70] that she might be subject to some civil liability as a transferee for inadequate consideration.

That sufficient evidence of additional tax liability by the taxpayers, Clifford O. Boren and Delta M. Boren, has been shown to warrant an investigation at this time. That the taxpayers, Clifford O. Boren and Delta M. Boren, have by written consent extended the statute of limitation with respect to civil liability until June 30, 1955.

X.

That the books and records and other documents as set forth in the summons are material to the investigation of the tax liability of Clifford O. Boren and Delta M. Boren and that an examination of said books, records and other documents by the Internal Revenue Service as set forth in the summons is not an unnecessary examination nor is it unreasonable either as to respondent or Clifford O. Boren and Delta M. Boren. That investigation of the Borens was commenced, and has not been

completed within the meaning of the provisions of the Internal Revenue Act.

XI.

That all the facts found to be true in the memorandum filed herein by the Court on the 17th day of February, 1955, are herein found to be true.

Conclusions of Law

I.

That the production of the books and records and documents set forth in the summons will not incriminate respondent under the Fifth Amendment of the Constitution.

II.

That respondent produce the books, records and documents specified in the summons in accordance with the provisions thereof.

III.

That compliance with the subpoena by Evelyn Hubner will not be oppressive so as to violate the Fourth Amendment of the Constitution.

IV.

That an attachment against the person of respondent should issue for failure to produce said books, records and documents. [71]

V.

That all conclusions of law in the memorandum filed herein by the Court on the 17th day of February, 1955, are incorporated herein.

Now, Therefore, It Is Ordered Adjudged and Decreed that an attachment against the person of Evelyn Hubner as and for contempt should and is hereby issued and the respondent is remanded to the custody of the Marshal, until she complies with said summons, but said attachment and commitment are stayed, however, until 12:00 noon, February 18, 1955, with further proviso that said stay of execution shall become permanent if on or before said time and date respondent shall deliver to the Clerk of this Court Books of Account of the partnership, known as the Hubner Building Company and the corporation, known as the Hubner Building Company, relating to transactions had by that partnership and corporation with Clifford O. Boren and Delta M. Boren for the years 1950, 1951 and 1952, together with paychecks, invoices, correspondence, and any and all miscellaneous records, data, and memoranda relating to transactions between the Hubner Building Company and Clifford O. Boren and Delta M. Boren.

It Is Further Ordered that upon delivery of these Books of Account, records and other documents that agents of the Internal Revenue Service and agents of the respondent shall have the right at all reasonable times to examine said Books of Account, records and documents and may have photostatic copies of the same or any portion thereof by designation to the Clerk who shall use the facilities of the office of the Clerk of this Court for making such photostats.

Dated: Feb. 17, 1955.

/s/ PEIRSON M. HALL,

United States District Court
Judge.

[Endorsed]: Filed February 17, 1955.

Docketed and entered February 23, 1955. [72]

[Title of District Court and Cause.]

STAY OF COMMITMENT PENDING
PERFECTION OF APPEAL

On this 18th day of February, 1955, the parties hereto appearing by their counsel, Robert W. Conyers and H. M. Fisher for Respondent, and Howard Harris for Petitioner, and

On motion of Respondent for the stay of the commitment contained in the order of this court dated February 17, 1955, and

It appearing that Respondent has prepared a Notice of Appeal and desires to appeal the decision of the court herein; Now, Therefore, good cause appearing,

It Is Ordered, Adjudged and Decreed that further execution of the Order for Attachment against the person of Evelyn Hubner for contempt shall be, and it is hereby, stayed on condition that Respondent perfects her intended appeal herein within thirty days hereof and until application to the Appellate Court may be made for any further

stay and the action on such motion by the Appellate Court. This order and the stay herein granted shall expire forty days from the date hereof unless Respondent has within that time perfected her appeal and made application to the Appellate Court for a further stay.

Dated: February 18, 1955.

/s/ PEIRSON M. HALL,
Judge.

[Endorsed]: Filed February 18, 1955. [73]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Evelyn Hubner, Respondent above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from a Final Judgment entered in this action on February 17, 1955, adjudging Respondent in contempt of this Court.

/s/ ROBERT W. CONYERS,

SLOANE & FISHER,

ROBERT W. CONYERS,

Attorneys for Respondent

Evelyn Hubner.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 24, 1955. [74]

In the United States District Court, Southern
District of California, Southern Division

No. 1691-SD Civil

LLOYD M. TUCKER, Special Agent, Internal
Revenue Service,

Petitioner,

vs.

EVELYN HUBNER,

Respondent.

Honorable Peirson M. Hall, Judge, Presiding.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

San Diego, California, February 3, 1955

Appearances:

For the Petitioner:

LAUGHLIN E. WATERS,

United States Attorney,

Los Angeles 12, California, by

HARRY D. STEWARD,

Assistant United States Attorney.

For the Respondent:

ROBERT W. CONYERS, ESQ.,

924 San Diego Trust & Savings Bldg.,

San Diego 1, California, and

SLOANE & FISHER,

1230 Bank of America Building,

San Diego 1, California, by

HUGO FISHER, ESQ.

February 3, 1955—2:00 o'Clock P.M.

The Clerk: 1690, Civil, Lloyd M. Tucker v. Hugo M. Fisher.

Mr. Steward: Ready for the petitioner.

Mr. Conyers: Ready.

The Clerk: 1691, Civil, Lloyd M. Tucker v. Evelyn Hubner.

Mr. Conyers: Ready.

Mr. Steward: Ready, your Honor.

The Court: Very well. As to Case 1690, I notice there is no response.

Mr. Steward: That is correct. I believe that was pursuant to an agreement, your Honor, that that matter on the representation previously made in court by Mr. Fisher would effect immediately no personal concern in this transaction other than as questions might be involved in respect to a motion for dismissal. So I would like at this time to file this document with the clerk.

The Court: Very well. Is there an order here?

Mr. Steward: Yes, your Honor. In the affidavit filed in Case No. 1691 it was represented that she has all the books and records involved.

The Court: In any event, this other matter is not involved in your petition?

Mr. Steward: No. [3*]

The Court: Very well. The proceedings as to Case No. 1690 will be dismissed.

As to 1691, I have read the petition, the responses and the affidavits and memorandum of law which have been filed.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Does either counsel wish to argue the matter? Do either of you have any additional points to present?

Mr. Steward: On behalf of the petitioner, your Honor, we are willing to submit it on the basis of the record as it now stands.

Mr. Conyers: I think we have nothing in addition to our briefs to offer at this time, your Honor.

The Court: Very well.

This is a proceeding which is filed under the provisions of Section 7604 of the Internal Revenue Code, seeking the enforcement by this court of a subpoena issued by the Internal Revenue Bureau in connection with an investigation, according to the face of the subpoena, of the tax liability of Clifford O. Boren and Delta M. Boren. This subpoena is directed to the petitioner, Evelyn Hubner, directing her to appear before Lloyd M. Tucker, and to bring the books and records of the partnership known as the Hubner Building Company, and the corporation known as the Hubner Building Company, relating to transactions had by that partnership with the aforesaid Clifford O. Boren and Delta M. Boren for the years 1950, 1951 and 1952, together with paychecks, invoices, [4] correspondence, and any and all miscellaneous records, data and memoranda relating to the transactions between said partnership and the above-named taxpayers.

The respondent appeared at the time and place set forth in the subpoena, but the petitioner, how-

ever, declined to produce any of the books and records claiming that it would be a violation of the Fifth Amendment, and this proceeding followed.

From the answer to the petition for attachment and from the affidavits filed, it is apparent that the investigation being conducted by the Internal Revenue Bureau is not an investigation of the respondent, Evelyn Hubner, for any possible criminal liability. It is an investigation directed to the affairs and possible tax liability and possible criminal liability of Clifford O. Boren and Delta M. Boren, both of whom are persons who are different than the respondent, Evelyn Hubner.

It appears that the Hubner Building Company was engaged in the building business. It was a corporation from February 14, 1950, to September 30, 1950, at which time the Hubner Building Company was dissolved as a corporation and continued business as a partnership until the time of its dissolution on June 6, 1951. Its affairs, however, according to the affidavit, were not finally wound up until February 28, 1953.

The respondent, Beatrice Evelyn Hubner, is the surviving [5] spouse of E. J. Hubner, who appears to be the moving factor of the Hubner Construction Company and one of the partners. She did not marry E. J. Hubner until May 23, 1952, after the dissolution of the partnership and after the dissolution of the corporation.

The books which are sought here are the books and records of the partnership and/or the corporation, with which it is quite apparent from the docu-

ments filed here that the petitioner, Evelyn Hubner, is not and was not connected, nor does she appear to have been concerned as an employee of the Hubner Building Company, either as a corporation or as a partnership.

Some claim is made that by virtue of a transfer of certain property known as the Big Oak Ranch by E. J. Hubner to the respondent in this case, which appears to have occurred prior to the marriage, that the respondent is fearful that the Government may file some additional tax claim against the Hubner Construction Company and attempt to pursue the property that was thus transferred to the respondent in this case by the deceased E. J. Hubner.

That is not a sufficient ground for the refusal to answer any questions or to present any records, even though the disclosures made might finally result in a different proceeding against the respondent in this case for the recovery of that property transferred to the respondent which [6] the Government may have for any tax liability which might be found to be assessed against E. J. Hubner for the year involved.

The respondent in the brief relies largely upon the case of the Chandis Securities Company, and asserts that the Government, in sending the Revenue Bureau to examine the books, has already had one opportunity to examine the books of the Hubner Building Company, and have done so, and that the provisions of the code permit the examination of books, or rather prohibit the burdensome examina-

tion of books and do not permit it when it is unnecessary, as was the case in *Chandis Securities Co. v. Martin*, 128 F. (2d) 731.

In that case, while it did involve the enforcement of a subpoena and the examination of books and records in the hands of the Chandis Securities Company concerning the possible tax liability of a third person named Martin, the court there stated that Section 3614(a) of the Internal Revenue Code permitted the examination of taxpayer's books only when it is necessary and it might be taken as dicta in support of the respondent's position in this case.

However, an analysis of that case, in reading the decision of the appellate court and without having recourse even to the decision of the trial judge in that matter, it becomes quite evident that all that the Ninth Circuit held in the case of *Chandis Securities Co. v. Martin* was that under that [7] provision of the Internal Revenue Code it does not permit examination of the taxpayer's books where not necessary; that all it held in that case was that where the statute of limitations on the face of the record had expired, an examination of the third person's books is not necessary.

There is no such element present in this case. The statute of limitations against the persons under investigation, the Borens, has not run, and if it has run the Borens themselves have consented to an extension of time, having signed a consent fixing period of limitation upon assessment of income tax and profits tax. Therefore the *Chandis Securities*

case is not authority for the position taken here by the respondent in this case.

Furthermore, the Chandis case would have another ground of distinction, as in that case they sought in the year 1940 to compel the production of records from 1916 to 1930. No such a situation is present here. The records which are sought to be examined are the records for the years 1950, 1951 and 1952, which are not comparable to the period even which was attempted to be imposed in the Chandis case of making them produce records that were many years old.

Moreover, as I view the statute, the provision of the Internal Revenue Code which prohibits the examination of books which are unnecessary becomes a question of fact to be decided in each case as to whether they are or are not necessary. [8]

Some other grounds are suggested, that the books here are not material to the investigation. I do not think that the respondent here is in any position to raise that question. Whether they are material or are not material is a question which can be raised by the party involved, namely, the Borens, if it can be raised at all, and I do not think it can be raised in this kind of a proceeding by the person who is not being investigated as the taxpayer.

I think I have covered all of the points which have been raised by counsel in their briefs, and I imagine that you might guess by this time that the prayer of the petition ought to be, and is, granted.

I find myself in this position, however, or, rather, I think that rather than committing the defendant

to jail for contempt until she produces the books, that perhaps a method can be worked out which would not be burdensome, either upon the respondent or upon the Government, and still at the same time would preserve to the respondent the records which she naturally wants to have preserved for whatever purpose she may desire or need for herself or as administratrix of the estate of the deceased, which is another point here which is not in her favor because an administratrix should hold the property without any personal interest in them and solely as a custodian. [9]

However, my ruling is not based upon that, it is based upon the grounds which I have heretofore indicated.

Now, if counsel wish to make a test of the case, which you may well wish to do, by recourse to the appellate court, I will make the formal order as prayed for by committing the defendant for contempt until she produces the books. If counsel, however, do not intend to make it a test case, I will make an order which will require the respondent to produce the books and deposit them with the clerk of this court, where they may remain for examination by the Internal Revenue Agents, with a provision that if the Internal Revenue Agents desire any photostatic copies of any documents that they shall designate them in writing to the clerk and that the facilities of the clerk of the court shall be used at the expense of the Government in the making of photostats of whatever documents they require to have photostated.

Now, it may be that the Internal Revenue Bureau would not want to accept that condition. It may be that the Government would not want to accept that condition.

Mr. Steward: Your Honor, in this case, unlike many other cases, we are not interested in a test case. The only thing we want is the books, and the procedure outlined by the court with respect to having the books and records filed with the clerk is satisfactory to the petitioner.

Mr. Conyers: That will be satisfactory, your Honor. I [10] hardly think we are in a position to deposit our client in jail for the purpose of testing some theory of law.

The Court: If you desire to test it, I would stay the execution of the order until you can get your papers prepared. I do not want to put her in jail this afternoon and put you under the gun of getting a writ releasing her from the appellate court.

Mr. Conyers: I may be too faint-hearted, your Honor, but that had occurred to me, and I wonder if it might be possible for us, rather than attempting to make some of the decisions right on the spot, and perhaps in an excess of cautiousness make a decision we might not want to stand by, it might be easier all around if we might permit a reasonable time to determine whether our interests demand an appeal or whether at this point we might accede to the other horn of the dilemma, and that is deposit the books with the clerk of the court.

The Court: Well, I think that the United States Attorney might prepare an order for my signature granting the petition, committing the respondent

to jail for contempt until she produces the books, which will be stayed until, let us say, February 8—that is next Tuesday—at 12:00 o'clock noon, and it will thereafter be permanently stayed if the respondent deposits all of the books and records with the clerk of this court, where they may remain for examination by both [11] herself and the Internal Revenue Agents at her convenience and at their convenience.

Mr. Conyers: I think that will be fine, your Honor.

The Court: That will give you some time to give some deliberation to the course you would want to follow between now and next Tuesday, and if you decide that you want to test the matter—I am not suggesting that you should or should not——

Mr. Conyers: I appreciate that.

The Court: ——but as a conscientious lawyer you are confronted with the duty of making that determination. However, that will give you sufficient time to do that.

Mr. Conyers: I appreciate that.

The Court: Now, would that be sufficient time?

Mr. Conyers: I believe it would, your Honor; yes.

The Court: Is that satisfactory?

Mr. Steward: Yes.

The Court: And you will agree to such an order?

Mr. Steward: That is very agreeable.

The Court: Very well. You will prepare the order and submit it.

Mr. Steward: Yes, your Honor. I will submit it by this afternoon, or try to.

The Court: In any event, the respondent is present, though the record does not show whether she is or is not. [12]

Mr. Conyers: She is present, your Honor.

The Court: Will she make herself known?

(The respondent rose.)

The Court: You are Evelyn Hubner, the respondent?

The Respondent: Yes.

The Court: You have heard the order of the court?

The Respondent: Yes, I did.

The Court: Do you understand it?

The Respondent: Yes.

The Court: What is it?

The Respondent: I am to deliver the books to the clerk.

The Court: You are to go to jail for contempt until you deliver the books, but the order is stayed until 12:00 o'clock noon, February 8th, and it will thereafter be permanently stayed if prior to that time you deposit and deliver all of the books, records and papers that are called for by the subpoena with the clerk of this court for their subsequent examination by the Internal Revenue Agents and by yourself or anyone that may be designated.

Mr. Conyers: Your Honor, would that stay also apply if by that time notice of appeal has been filed? Would the stay be applicable in that situation if that should happen to be our choice?

The Court: No; I think you would have to get another stay if you file an appeal. [13]

Mr. Conyers: Very well.

The Court: In other words, I want to make the order definite so that it is in a form that is appealable and contestable, and at the same time I do not want to make it unduly onerous and burdensome to present such question. I think that the order in the form that I have announced will preserve the question on appeal and at the same time if compliance is had it will not impose any undue burden on anyone.

Mr. Conyers: Thank you, your Honor.

The Court: Very well. Court is adjourned.

(Whereupon, at 2:30 o'clock p.m., court was adjourned.) [14]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at San Diego, California, this 6th day of February, A.D. 1955.

/s/ AGNAR WAHLBERG,
Official Reporter.

[Endorsed]: Filed March 24, 1955. [15]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 78, inclusive, contain the original:

Petition for Order of Attachment of Person for Civil Contempt.

Order to Show Cause.

Answer to Petition for Order of Attachment.

Affidavit of Jack M. Harrison re Petition for Order of Attachment.

Affidavit of Beatrice E. Hubner re Petition for Order of Attachment;

Affidavit of H. M. Fisher re Petition for Order of Attachment.

Affidavit of Delta M. Boren re Petition for Order of Attachment.

Brief in Opposition to Petition for Order of Attachment.

Brief in Support of Petition for Order of Attachment, etc.

Affidavit of Lloyd M. Tucker.

Affidavit of John L. McIver.

Affidavit of Henry N. Miller.

Findings of Fact, Conclusions of Law and Order; Lodged Feb. 8, 1955.

Request for Additional Findings and for Amendments to Findings of Fact.

Memorandum.

Findings of Fact, Conclusions of Law and Order.

Stay of Commitment Pending Perfection of Appeal.

Notice of Appeal.

Designation of Contents of Record on Appeal.

Which, together with a full, true and correct copy of the minutes of the Court on Dec. 22, 1954, and Jan. 13, Jan. 21, Feb. 3, and Feb. 8, 1955; and 1 volume of Reporter's Transcript of Proceedings had on Feb. 3, 1955; all in said cause, constitute the Transcript of Record on Appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid by appellants.

Witness my hand and the seal of said District Court this 29th day of March, 1955.

[Seal]

EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14704. United States Court of Appeals for the Ninth Circuit. Evelyn Hubner, Appellant, vs. Lloyd M. Tucker, Special Agent, Internal Revenue Service, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed March 30, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 14704

EVELYN HUBNER,

Appellant,

vs.

LLOYD M. TUCKER, Special Agent, Internal
Revenue Service,

Appellee.

STATEMENT OF POINTS ON APPEAL

I.

Appellant herewith presents the points on which she claims the District Court erred:

1. That the Court erred in holding that the Appellee was entitled to re-examine books and records in the possession of Appellant without having complied with the requirements of Section 7605 (b) of the 1954 Internal Revenue Code.

2. That the Court erred in holding that no unlawful search and seizure would occur if Appellant is required to deliver her books and records without the Government having complied with the provision of Section 7605 (b) of the 1954 Internal Revenue Code.

3. That the Court erred in holding that the Appellant could not claim the privilege of the Fifth Amendment in refusing to produce the books and records set forth in the Summons.

* * *

SLOANE & FISHER,

ROBERT W. CONYERS,

By /s/ H. M. FISHER,

Attorneys for Appellant.

[Endorsed]: Filed April 8, 1955.